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No. 91-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE INSURANCE COMPANY, LIMITED,

Petitioner,

vs.

CONSTANCE B. FOSTER, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of The Mutual Fire, Marine and Inland Insurance Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the district court's remand order would be reviewable under 28 U.S.C. § 1447(d) (1964), which bars review of a remand order based on a "defect in removal procedure" under 28 U.S.C. § 1447(c) (1988), where Petitioner now characterizes the district court's remand order as one based on a "defect in removal procedure."

Whether the Third and Fifth Circuits' decisions are consistent where both courts have held that the thirty-day filing limit under 28 U.S.C. § 1447(c) applies only to a remand motion based on a "defect in removal procedure."

Whether the Third Circuit's decision is consistent with this Court's holdings in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) where the Third Circuit held that the district court was authorized to remand a removed case in order to enforce the parties' forum selection agreement.

Whether the Third Circuit's decision that Petitioner, a non-foreign state defendant, waived its right to remove, conflicts with the Sixth Circuit's decision in *In re Delta America Re Insurance Co.*, 900 F.2d 890 (6th Cir.), *cert. denied*, 111 S. Ct. 233 (1990), which applies exclusively to removal by a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976).

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JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Third Circuit by writ of certiorari under 28 U.S.C. § 1254(1) (1940).

The Third Circuit had jurisdiction to review the remand order of the United States District Court for the Eastern District of Pennsylvania because it was a collaterally final order pursuant to 28 U.S.C. § 1291 (1982). *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-78 (9th Cir. 1984). Furthermore, review of the remand order was not

barred by 28 U.S.C. § 1447(d), which precludes review of a remand order issued under 28 U.S.C. § 1447(c). As Petitioner argued below, the district court's remand order was not based on a ground specified within 28 U.S.C. § 1447(c), and thus, was reviewable. *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988); *Clorox*; *Pelleport*.

However, Petitioner now contends that the district court's remand order was grounded in a "procedural defect in removal," under 28 U.S.C. § 1447(c). Under Petitioner's current characterization of the remand order, 28 U.S.C. § 1447(d) would preclude appellate review. *Thermtron*, 423 U.S. 336 (1976).

STATEMENT OF THE CASE

Respondent, Constance B. Foster, is the Insurance Commissioner of the Commonwealth of Pennsylvania. Respondent is the statutory Rehabilitator of an insolvent insurance company, The Mutual Fire, Marine and Inland Insurance Company ("Mutual Fire"). *See* 40 Pa. Cons. Stat. Ann. §§ 221.1-221.63 (Purdon Supp. 1990).[1] At all relevant times, Mutual Fire was a mutual property, casualty and special risks insurance company organized and licensed under the laws of the Commonwealth of Pennsylvania.[2]

Pursuant to a December 8, 1986 Order of the Commonwealth Court of Pennsylvania, Respondent controls the assets and affairs of Mutual Fire. In an effort to collect Mutual Fire's assets

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[1] As of December 31, 1988, Mutual Fire's deficit was over $400 million. At that time, the Mutual Fire insolvency was the country's third or fourth largest insurer failure. *Foster v. Chesapeake Ins. Co. Ltd.*, 933 F.2d 1207, 1210 n.3; A-4 n.3. (references to the Appendix in the Petition for Writ of Certiorari are designated as "A-____"; references to the Appendix in Respondent's Brief in Opposition are designated as "RA-____").

[2] Mutual Fire has no parent company. Mutual Fire's subsidiaries, as defined by Sup. Ct. R. 29.1, are: Endmark Data Processing Corporation; First New York Syndicate Corporation; and Ryansure Intermediaries, Inc.

for distribution to its creditors, Respondent has sued Petitioner in the Commonwealth Court of Pennsylvania for its failure to pay Mutual Fire over $4 million under a reinsurance contract.[3]

Petitioner and Mutual Fire executed the reinsurance contract in 1982. The contract contained a clause that provided Mutual Fire with the unilateral choice of forum in which to resolve any payment disputes (the "forum selection clause"). The clause provided, in relevant part:

> In the event the Retrocessionaire is not domiciled in the United States of America, and the Retrocessionaire fails to pay any amount claimed to be due hereunder, the Retrocessionaire, at the request of the Company, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction. . . .

Chesapeake, 933 F.2d at 1216; A-20.[4]

Mutual Fire paid Petitioner the premiums due under their agreement. However, when Mutual Fire's underlying risks became actual liabilities, Petitioner failed to pay the reinsurance due Mutual Fire. On September 29, 1989, Respondent sued Petitioner in the court overseeing Mutual Fire's rehabilitation, the

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[3] A reinsurance contract is an indemnity agreement between insurance companies under which one company, the reinsurer or retrocessionaire (in this case, Petitioner), agrees to reinsure risks written by the other (in this case, Mutual Fire). The contract in this case provided that Mutual Fire would pay premiums to Petitioner. In return for the premiums, Petitioner would assume a portion of the risks that Mutual Fire bore on its insurance policies. Petitioner would be obligated to pay Mutual Fire for the assumed risks once they became actual liabilities. *Chesapeake*, 933 F.2d at 1209; A-3.

[4] The contract between Petitioner and Mutual Fire was effective on July 1, 1982. The parties renewed it in 1983. The contract eventually covered an underwriting period through June 30, 1985. The forum selection clause in the 1983 renewal was virtually identical to that in the 1982 contract.

Commonwealth Court of Pennsylvania. On October 18, 1989, Petitioner, in violation of the forum selection clause, removed this action to the United States District Court for the Eastern District of Pennsylvania. *Chesapeake*, 933 F.2d at 1210, 1216; A-4, A-19.

Following removal, the parties executed a court-approved stipulation (the "Stipulation") in which Respondent agreed to extend, until November 10, 1989, the time for Petitioner to respond to her Complaint. In exchange, Petitioner agreed that Respondent could have until December 11, 1989, "to file a motion to remand, based on any defect in the removal procedure under 28 U.S.C. § 1447(c)." The Stipulation further provided that "these extensions are without prejudice to the rights of either party and shall not be deemed to constitute a waiver of any rights of either party." *Chesapeake*, 933 F.2d at 1212; A-9, A-28.[5]

On December 11, 1989, Respondent moved to remand the action to the Commonwealth Court of Pennsylvania on the ground that Petitioner, by agreeing to litigate in the forum chosen by Mutual Fire, waived its right to remove.[6] Petitioner opposed

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[5] Petitioner did not inform this Court of the Stipulation in its Petition for Writ of Certiorari. Petitioner's failure to do so constitutes a "misstatement[] of fact . . . which ha[s] a bearing on the question of what issues would properly be before the Court if certiorari were granted." Sup. Ct. R. 15.1. Contrary to its position below, Petitioner now contends that a contractual waiver of removal *is* a procedural defect under Section 1447(c). *See* Petition for Writ of Certiorari at 10-15. Thus, under Petitioner's present characterization of the district court's remand order, the Stipulation properly extended the time for Respondent to file her motion to remand. Moreover, pursuant to the Stipulation, Respondent's motion was timely filed. For this reason, Petitioner's argument about the applicability of the thirty-day limit for filing a remand motion under Section 1447(c), as well as Petitioner's argument about the alleged conflict between the Third and Fifth Circuits on this point, are moot. *See* Argument *infra*, pp. 7-9.

[6] Respondent also moved to remand on abstention grounds. Petitioner opposed remand on this basis. The district court did not address Respondent's abstention argument in light of its ruling on the forum selection clause. A-41.

remand, arguing that the forum selection clause was not a waiver of its right to remove; that the district court lacked authority to remand the action; and that, in any event, Respondent's motion to remand was untimely, despite the Stipulation.[7]

On October 4, 1990, the Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, rejected Petitioner's arguments and remanded the case to the Commonwealth Court of Pennsylvania. Judge Pollak concluded that the forum selection clause was both a waiver of Petitioner's removal right and an appropriate ground for remand. A-40, A-41.

On October [illegible], 1990, Petitioner appealed to the United States Court of Appeals for the Third Circuit.

On May 20, 1991, the Honorable Morton I. Greenberg, writing for a unanimous Third Circuit panel, affirmed Judge Pollak's remand order. The Third Circuit held that the forum selection clause in the parties' contract was a waiver of Petitioner's removal right; that the district court properly enforced the parties' agreement by remanding this action to the forum originally chosen by Respondent; and that Respondent's motion to remand was not untimely.

Petitioner moved to stay the issuance of the Third Circuit's mandate on June 10, 1991. On June 28, 1991, the Third Circuit denied Petitioner's motion and issued its mandate.

On August 15, 1991, Petitioner filed its Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit (the "Petition").

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[7] Petitioner further argued that the forum selection clause was invalid due to Mutual Fire's alleged "fraud, undue influence, or overweening bargaining power." *Chesapeake*, 933 F.2d at 1218-19; A-26. The district court summarily rejected this argument. A-40.

SUMMARY OF THE ARGUMENT

The Petition should be denied for several reasons.

First, under Petitioner's current construction of Section 1447, the district court's remand order is not reviewable. Contrary to its position below, Petitioner now argues that the remand order was based on a "defect in removal procedure" under Section 1447(c). Although Respondent disagrees with Petitioner's new position, under Petitioner's current construction, Section 1447(d) would preclude appellate review of the remand order.

Second, there is no conflict between the circuits regarding the construction of Section 1447(c). The Fifth Circuit has held, as did the Third, that only remand motions grounded in a "procedural defect in removal" are subject to a thirty-day filing limit under Section 1447(c). Neither court has held that a motion to remand, based on contractual waiver of removal, constitutes a procedural defect in removal subject to this time limit.

Third, the Third Circuit's decision that, despite diversity jurisdiction, a district court may remand a removed case in order to enforce a forum selection agreement is consistent with this Court's decisions in *Cohill* and *Thermtron*.

Finally, there is no conflict among the circuits regarding the construction of the forum selection clause. Both the Third and Fifth Circuits have held that the forum selection clause constitutes a waiver of removal, while the Sixth Circuit's decision in *Delta America*, because it applies exclusively to removal by a foreign state under the Foreign Sovereign Immunities Act, is inapposite.

ARGUMENT

I. UNDER PETITIONER'S CURRENT CONSTRUCTION OF SECTION 1447, THE DISTRICT COURT'S REMAND ORDER WOULD NOT BE REVIEWABLE.

Section 1447(d) provides, in relevant part, that:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . .

Section 1447(d) must be construed together with Section 1447(c). *Thermtron*, 423 U.S. at 345. "This means that only remand orders issued under § 1447(c) and invoking grounds specified therein . . . are immune from review." *Thermtron*, 423 U.S. at 346. Section 1447(c) enumerates two grounds for remand: (1) if there is a "defect in removal procedure"; and (2) if it "appears that the district court lacks subject matter jurisdiction."

The parties agreed in the district court that Respondent's remand motion did not invoke a ground specified in Section 1447(c), *i.e.*, it was based neither on a procedural defect in removal nor on a lack of subject matter jurisdiction. A-36. Furthermore, when the Third Circuit questioned whether the remand order was reviewable in light of Section 1447(d), Petitioner reiterated that the remand order was not grounded in Section 1447(c), and thus, was reviewable:

> Here, as noted, Plaintiff's remand motion was based on two grounds *not* provided for by § 1447(c), abstention and the "Service of Suit" clause in the subject reinsurance agreements; the District Court granted the motion based on the latter ground. Clearly, a remand order premised on a forum selection clause is not based on either ground specified by § 1447(c); therefore, it is not immunized from review by § 1447(d).

> Accordingly, since the Remand Order below was not predicated on a ground authorized by § 1447(c), it fully is reviewable by this Court on appeal.

RA-4.

Despite its position before the Third Circuit and the district court, Petitioner now argues that Respondent's remand motion *was grounded in a procedural defect* and, thus, based on a ground enumerated in Section 1447(c):

> The Fifth Circuit reasoned that removal in derogation of a substantive restriction on removal jurisdiction (i.e., a forum selection clause), as well as in violation of a particular removal procedure, each constitutes a defect in 'removal process' and is governed by Section 1447(c).

Petition at 13 (discussing *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991) and *In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991)).

Petitioner's construction of Section 1447 is disingenuous. Before the Third Circuit, Petitioner argued that the remand order was not based on a defect in removal procedure under Section 1447(c). This position suited Petitioner's goal - appellate review of the district court's remand order. Now, having lost its appeal, Petitioner has changed its tack. In an effort to create a conflict between the Third and Fifth Circuits, Petitioner now argues that removal in violation of a forum selection clause *does* constitute a defect in removal procedure under § 1447(c).

Such disingenuity should not be countenanced. Petitioner should be estopped from disavowing its prior construction of Section 1447. Under Petitioner's earlier construction, the remand order was not grounded in a defect in removal procedure under Section 1447(c). The Fifth Circuit's opinions in *Baris* and *Shell Oil*, however, are germane only to a remand order grounded in a such a defect. Therefore, under Petitioner's former construction of Section 1447(c), the Fifth Circuit's decisions in *Baris* and *Shell Oil* have no bearing on the issues that were before the Third Circuit.

Alternatively, under Petitioner's new construction, the remand order was based on a ground specified in Section 1447(c), namely, a defect in removal procedure. Under this construction, the fact that Respondent moved for remand on the fifty-fourth day after removal does not take the remand order out of Section 1447(c). Through the Stipulation, Petitioner, with the court's approval, extended the statutory period for Respondent "to file a motion to remand, based on any defect in the removal procedure under 28 U.S.C. 1447(c)." A-28. Thus, under Petitioner's current characterization, the remand order was based on a ground that Petitioner alleges is within Section 1447(c). Accordingly, the Petition should be denied, as the order from which Petitioner appeals would not be reviewable under Section 1447(d).

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS REGARDING THE CONSTRUCTION OF SECTION 1447(c).

Section 1447(c) provides, in relevant part, that:

> A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days after the filing of the notice of removal under section 1446(a).

Petitioner argues that the Fifth Circuit's construction of the thirty-day filing limit differs from that of the Third Circuit. In *Baris* and *Shell Oil*, the Fifth Circuit held that a remand motion based on a procedurally defective removal must be filed within thirty days of removal. *Baris*, 932 F.2d at 1543-46; *Shell Oil*, 932 F.2d at 1521. The Third Circuit does not disagree with the Fifth. *Chesapeake*, 933 F.2d at 1212-13; A-9-A-13.

Furthermore, the Fifth Circuit's decisions in *Baris* and *Shell Oil* are immaterial under Petitioner's prior construction of Section 1447(c). The Third Circuit had before it a remand motion that Petitioner stated was not based on a defect in removal procedure within the meaning of Section 1447(c). A-29, A-36, RA-1-RA-4. Thus, the Fifth Circuit's opinions, which apply only to a remand motion based on a procedurally defective removal, have no bearing on the issues that were before the Third Circuit.

Despite Petitioner's misapplication of *Baris* and *Shell Oil*, there is no conflict between the Third and Fifth Circuits. Neither *Baris* nor *Shell Oil* involved a remand motion based on contractual waiver. Rather, both cases involved remand motions that the Fifth Circuit defined as grounded in a "procedural defect in removal" based on a statutory prohibition against removal. In *Baris*, the removing party violated an alleged prohibition on removal under admiralty law. 932 F.2d at 1543. In *Shell Oil*, the removing party violated 28 U.S.C. § 1441(b) (1948), which prohibits the removal of cases in which forum defendants are present. 932 F.2d at 1521.

The removal petitions in *Baris* and *Shell Oil* were procedurally defective because of a flaw in the "process" by which the respective cases reached the district court. *See Baris*, 932 F.2d at 1545. If either *Baris* or *Shell Oil* had been filed in a district court in the first instance, they would have been within that district court's original jurisdiction, based on either diversity or federal question jurisdiction. However, once the cases were filed in state court, neither district court had *removal jurisdiction*, *i.e.*, the cases became non-removable. Under these circumstances, the Fifth Circuit considered removal to be a defective "process" for bringing the cases to the federal forum. *See Baris*, 932 F.2d at 1545. Hence, the Fifth Circuit deemed the removal petitions to be procedurally defective under Section 1447(c).

In this action, there was no flaw in the process by which the case reached the district court. Petitioner's removal petition was timely filed, and the district court had removal jurisdiction based on diversity of citizenship and an adequate amount in controversy. *Chesapeake*, 933 F.2d at 1210; A-4. The district court, in order to enforce the parties' agreement, properly adjudicated this case within its removal jurisdiction. In the exercise of this jurisdiction, the district court enforced a substantive contract provision between the parties. As the Third Circuit recognized:

> Indeed, the district court accepted jurisdiction and, in the exercise of that jurisdiction, determined, as a

> threshold matter on the merits, that Chesapeake had waived its right to remove the case - *i.e.* that, pursuant to the parties' contract, the case ought not to have been in federal court.

Chesapeake, 933 F.2d at 1215-16; A-18.

Thus, far from being a defect in the process by which the case reached the federal forum, as in *Baris* and *Shell Oil*, Petitioner's removal created an issue of substantive contract law to be resolved by the district court. In the exercise of its removal jurisdiction, the district court decided the contract issue in favor of Respondent and properly remanded this action to enforce the parties' agreement. Because the Fifth Circuit's opinions are inapplicable to the circumstances of this case, Petitioner's "conflict" is illusory. Accordingly, the Petition should be denied.

III. THE THIRD CIRCUIT'S OPINION IS IN ACCORD WITH THIS COURT'S DECISIONS.

Petitioner argues that the Third Circuit's ruling "clearly conflicts with this Court's decisions in *Cohill* and *Thermtron*, and improperly expands the powers of the district courts beyond those granted by Congress." Petition at 7.

In *Thermtron*, this Court held that a district court "exceeded its authority" in remanding a diversity case on a ground not enumerated in Section 1447(c),[8] namely the crowded condition of the federal docket. *Thermtron*, 423 U.S. at 345.

In *Cohill*, this Court revisited the question whether grounds for remand existed other than those enumerated in Section 1447(c). This Court held that a properly removed case could be remanded on the basis of pendent jurisdiction, a ground not specified in Section 1447(c):

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[8] The amendment to Section 1447(c) was not in effect when either *Thermtron* or *Cohill* were decided. The statute has changed only in that "improvidently" essentially has been recast to mean "procedurally defective," and a filing time limit has been placed on this type of remand motion. 28 U.S.C. § 1447(c) (1948).

> In *Thermtron*, a District Court remanded a properly removed case to state court on the ground that the federal docket was overcrowded. This Court held that the remand was improper. In so doing, the Court stated several times that a district court may not remand a case to a state court on a ground not specified in the removal statute. . . . Petitioners, again noting that the removal statute does not explicitly authorize the remand of cases involving pendent state-law claims, argue that *Thermtron* thus compels a holding that such remands are impermissible.
>
> The language from *Thermtron* that petitioners cite, viewed in isolation, is admittedly far-reaching, but it loses controlling force when read against the circumstances of that case. The *Thermtron* decision was a response to a clearly impermissible remand, of a kind very different from that at issue here.

Cohill, 484 U.S. at 355-56.

Upon review of the quoted *Cohill* language, the Third Circuit held that "*Cohill* clearly overruled *Thermtron* to the extent that *Thermtron* had held that only statutory grounds for remand are authorized." *Chesapeake*, 933 F.2d at 1214; A-15.[9]

Petitioner argues from *Cohill* that diversity jurisdiction is mandatory, and cannot be declined under any circumstances, as if to suggest that the Third Circuit somehow disagreed. The Third Circuit did not:

> Here, of course, removal was based on diversity of citizenship, and the district court did *not* have *discretion* to decline to exercise jurisdiction: its *jurisdiction* was *mandatory*.

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[9] The Second and Seventh Circuits also have stated that *Thermtron* has been overruled by *Cohill* on this point. *Corcoran v. Ardra*, 842 F.2d 31, 36 (2d Cir. 1988)("*Cohill* reveals that permissible bases for remand are not so limited" as set forth in *Thermtron*); *Rothner v. City of Chicago*, 879 F.2d 1402, 1406 (7th Cir. 1989)("the Court in effect held, contrary to *Thermtron*, that § 1447(c) does not contain *all* of the permissible grounds for remand")(emphasis supplied by the court).

Chesapeake, 933 F.2d at 1214; A-14 (emphasis supplied by the court). However, as the Third Circuit also recognized, the district court in the instant case *did exercise its diversity jurisdiction*:

> Unlike the district court in *Thermtron*, the district court here did not refuse to hear a case properly before it. Indeed, the district court in this case accepted jurisdiction and, in the exercise of that jurisdiction, determined, as a threshold matter on the merits, that Chesapeake had waived its right to remove the case - *i.e.* that pursuant to the parties' contract, the case ought not have been in federal court. Thus while the district court did not have discretion, as in *Cohill*, to decline to hear the case at all, once it determined that the clause barred Chesapeake from removing, it would have been committing clear error - and violence to the parties' contract - had it nevertheless continued to hear the case.

Chesapeake, 933 F.2d at 1215-16; A-18.

Several other circuit courts of appeals, as well as numerous federal district courts, have held that a district court is authorized to remand a case based on contractual waiver of removal through a forum selection clause. The vast majority of these cases have been diversity cases.[10]

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[10] In the few instances where the cases do not specifically cite 28 U.S.C. § 1332(a) or otherwise expressly indicate that removal was based on diversity jurisdiction, the facts reveal that the cases are diversity cases. *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13 (5th Cir. 1991)(district court refusal to remand vacated; defendant is a Connecticut corporation and plaintiff is a Texas citizen); *In re Delta America Re Ins. Co.*, 900 F.2d 890 (6th Cir. 1990)(remand order reversed on other grounds but availability of remand on basis of forum selection clause unquestioned); *Regis Assocs. v. Rank Hotels (Management) Ltd.*, 894 F.2d 193 (6th Cir. 1990)(remand order reversed on other grounds but availability of remand order unquestioned; plaintiff is a Michigan limited partnership, defendant is an English corporation); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656 (2d Cir. 1988)(remand order upheld;

(Footnote continued)

The district court could have dismissed this case on the basis of a forum selection clause, as Petitioner has conceded, in order to enforce the parties' agreement. RA-5-RA-6. In *Cohill*, this Court endorsed a district court's discretionary power to remand, rather than to dismiss, based on the doctrine of pendent jurisdiction. A remand, rather than dismissal, furthered the principles underlying that doctrine, namely "economy, convenience, fairness, and comity." *Cohill*, 484 U.S. at 357. Advancing the principles enunciated in *Cohill*, the Third Circuit upheld the district court's power to remand based on the parties' forum agreement. As in *Cohill*, such a remand promotes economy, convenience, and fairness. *Chesapeake*, 933 F.2d at 1216; A-19. As the Third Circuit held, such principles must be taken into account, or else "a plaintiff proceeding in accordance with the parties' agreement will be penalized for the conduct of a defendant who does not." *Chesapeake*, 933 F.2d at 1216; A-19.[11]

Petitioner cites the dissenting opinion in *Cohill* throughout its argument. The dissenting Justices in *Cohill* were concerned with the plaintiffs' ability to dismiss federal claims as a means of manipulating a case back to state court. Such a tactic would

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diversity case); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984)(remand order upheld; diversity case); *Chestnut Realty of Haverford, Inc. v. First State Ins. Co.*, No. 90-2294, 1990 U.S. DIST. LEXIS 7772 (E.D. Pa. June 19, 1990) (diversity case); *Cessna Aircraft Co. v. Fidelity & Cas. Co. of New York*, 616 F. Supp. 671 (D.N.J. 1985); *Capital Bank & Trust Co. v. Associated Int'l Ins. Co.*, 576 F. Supp. 1522 (M.D. La. 1984)(diversity case); *Himes v. Admiral Ins. Co.*, 575 F. Supp. 312 (E.D. Ky. 1983)(diversity case); *Lavan Petroleum Co. v. Underwriters at Lloyds*, 334 F. Supp. 1069 (S.D.N.Y. 1971); *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453 (E.D. Cal. 1971) (diversity case); *Oil Well Serv. Co. v. Underwriters at Lloyd's London*, 302 F. Supp. 384 (C.D. Cal. 1969); *Euzzino v. London & Edinburgh Ins. Co.*, 228 F. Supp. 431 (N.D. Ill. 1964)(plaintiff is an Illinois citizen; defendant is a British corporation); *General Phoenix Corp. v. Malyon*, 88 F. Supp. 502 (S.D.N.Y. 1949)(plaintiff is a Pennsylvania corporation; defendant is an alien residing in England).

[11] The Third Circuit's rationale for upholding the district court's remand order is consistent with this Court's strong endorsement of the enforceability of forum selection clauses. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

"subject the defendant's supposed statutory right of removal to the plaintiff's caprice." *Cohill*, 484 U.S. at 362 (White, J., dissenting). Petitioner fails to recognize, however, that a remand based on a forum selection clause does not implicate this concern. A plaintiff that has chosen its court and legitimately expects to stay in that court pursuant to a forum selection clause cannot be viewed as having any interest in forum manipulation. Unlike the situation posited by the dissenting Justices in *Cohill*, any abuse in the instant case stemmed from Petitioner's ability to manipulate federal court procedure to avoid its contractual obligation.

The Third Circuit's decision is in accord with this Court's decisions. By upholding the district court's power to enforce the forum selection clause through a remand, rather than through a dismissal, the Third Circuit advanced principles commonly espoused by this Court - economy, convenience, fairness, enforcement of legitimate contractual obligations, and the avoidance of forum manipulation. Accordingly, the Petition should be denied.

IV. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE CONSTRUCTION OF THE FORUM SELECTION CLAUSE.

Petitioner argues that the Third Circuit's decision "squarely conflicts with the ruling of the Sixth Circuit" in *Delta America*. In *Delta America*, the Sixth Circuit reversed a remand order based on the same clause, holding that the clause was not a "clear and unequivocal waiver" of the removal right of a foreign state defendant. 900 F.2d at 894.

Delta America, however, is inapposite. By its facts, *Delta America* applies only to removal by a *foreign state* under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976) ("FSIA").[12]

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[12] Petitioner apparently believes that in labelling itself a "foreign defendant" it somehow brings itself within the parameters of the *Delta America* holding. Petition at 16. This legerdemain does not transform Petitioner into a "foreign state" under the FSIA.

The FSIA restricted the immunity of foreign states from federal and state court jurisdiction. *See* 28 U.S.C. § 1605.[13] However, to deter the possibility of local bias and prejudice, the FSIA provides a foreign state with an absolute right of removal, relaxes the time limits for the filing of a removal petition, and guarantees the right to a non-jury trial in federal court. 28 U.S.C. § 1441(d) (1976). The Sixth Circuit reasoned that these removal rights were so important to a foreign state that the court required a high standard by which to ascertain whether a foreign state had waived these rights. *Delta America*, 900 F.2d at 893.

The Sixth Circuit also was interested in developing a uniform body of federal law in light of the judiciary's new responsibility under the FSIA to decide questions of sovereign immunity. "[T]he development of a uniform body of law is served when cases involving foreign sovereigns or their agencies are tried in a federal forum." *Delta America*, 900 F.2d at 894. The concerns underlying the Sixth Circuit's decision, however, are inapplicable because Petitioner is not a foreign state. Likewise, the instant litigation does not implicate any questions of sovereign immunity.

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[13] Section 1603(a) of the FSIA defines "foreign state" as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." Section 1603(b) defines "agency or instrumentality of a foreign state" as follows:

> (b) . . . any entity—
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

The Sixth Circuit expressly restricted its holding that "any claimed waiver of the right of removal stemming from contractual language must be explicit" to "*future cases involving foreign states*." *Delta America*, 900 F.2d at 894 (emphasis added). Accordingly, *Delta America* does not conflict with the Third Circuit's decision in this case. The Sixth Circuit specifically declined to address cases "involv[ing] forum selection clauses, but not foreign states." *Delta America*, 900 F.2d at 894 n.9. In fact, in one of the district court cases cited by the Sixth Circuit in support of its holding that a waiver of removal must be "clear and unequivocal," *Capital Bank*, the district court held that an identical forum selection clause was a waiver of removal by a non-foreign state defendant. *Capital Bank*, 576 F. Supp. at 1524, *cited in Delta America*, 890 F.2d at 892.[14]

The Eighth Circuit opinion cited by Petitioner, *Weltman v. Silna*, 879 F.2d 425 (8th Cir. 1989) adds nothing to Petitioner's argument. The Eighth Circuit, in espousing a "clear and unequivocal" standard for waiver of removal, cites, without analysis, to a treatise. *Weltman*, 879 F.2d at 427.[15] In addition, because

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[14] Subsequent to *Delta America*, the Fifth Circuit held, in accord with the Third, that a remand based on a nearly identical forum selection clause was appropriate. *Nutmeg*, 931 F.2d at 15. As did the Third Circuit, the Fifth Circuit found *Delta America* inapplicable to waiver of removal by a non-foreign state defendant.

[15] The Eighth Circuit cites 1A J. Moore, B. Ringle & J. Wicker, *Moore's Federal Practice* ¶ 0.157[9] (2d ed. 1987). As the Third Circuit pointed out, "Moore makes his statement solely in the context of a discussion of waiver of removal by the defendant's participation in state court proceedings." *Chesapeake*, 933 F.2d at 1218 n.15; A-24 n.15. The Third Circuit goes on to note that a "clear and unequivocal" standard makes sense in this context:

> Otherwise, in order not to waive the right to remove defendants would have to remain inactive in the state court, running the peril of being held in default should a remand from the district court later occur.

However, with respect to contractual waiver:

(Footnote continued)

the Eighth Circuit failed to set forth the clause at issue, *Weltman* cannot serve as a basis for comparison.

In summary, there is no conflict among the circuits regarding the construction of the forum selection clause. The Sixth Circuit's decision in *Delta America* applies only to waiver of removal by a foreign state under the FSIA. It is inapposite to the decisions of the Third and Fifth Circuits, which neither involved a foreign state defendant nor implicated questions of sovereign immunity. Accordingly, the Petition should be denied.

> A court simply should determine contractual waiver of the right to remove using the same benchmarks of construction and, if applicable, interpretation as it employs in resolving all preliminary contractual questions. Indeed, inasmuch as the determination of whether there is a waiver of the right of removal to be derived from a forum selection clause will at least in some cases, such as here, be a matter of construction and thus of law, it seems anamolous to speak of a "clear and unequivocal" standard for we simply make plenary determinations of legal issues.

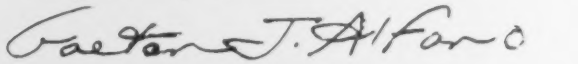
Chesapeake, 933 F.2d at 1218 n. 15; A-24-A-25 n. 15.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Dated: Philadelphia, Pennsylvania
September 16, 1991

Respectfully Submitted,



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APPENDIX

EXCERPT FROM CHESAPEAKE INSURANCE COMPANY, LIMITED'S RESPONSE TO THIRD CIRCUIT DIRECTIVE OF OCTOBER 15, 1990 REGARDING JURISDICTION

I. THIS COURT HAS APPELLATE JURISDICTION TO REVIEW THE REMAND ORDER

A. *The Remand Order Is Appealable*

Settled law provides that the Remand Order is a final order and thus appealable pursuant to 28 U.S.C. § 1291. In *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), this Court was confronted with a district court order remanding to Pennsylvania state court a matter originally removed from state court to bankruptcy court as a "related case" under 28 U.S.C. § 1471(b). This Court held that the remand order was reviewable pursuant to 28 U.S.C. § 1291 as a "final collateral order" under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949). *Pacor*, 743 F.2d at 987-89.

In holding the district court's remand order appealable in *Pacor*, this Court also relied on *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927 (1983) ("*Cone*"). *See Pacor*, 743 F.2d at 989-990. In *Cone*, the United States Supreme Court reviewed a district court's order staying a federal action in favor of concurrent state court litigation. With respect to whether there was appellate jurisdiction to review the district court's order, the Supreme Court reasoned that the district court's decision "meant that there would be no further litigation in the federal forum; [and] the state court's judgment on the issue would be res judicata". Consequently, the Supreme Court held that the district court's order "amount[ed] to a dismissal of the suit" and therefore was appealable as a final order. *Cone*, 460 U.S. at 8-10.

In complete accord with *Pacor* is *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-78 (9th Cir. 1984). In *Pelleport*, the Court of Appeals for the Ninth Circuit held that a remand order based on a contractual forum selection clause — the precise issue raised herein — is "reviewable

as a collaterally final order under [28 U.S.C.] section 1291". *Id.* at 277-78. As in *Pacor*, the Court in *Pelleport* held that a remand order satisfies the criteria of both *Cohen* and *Cone*. *Id.* Furthermore, the Second Circuit has reached the identical conclusion. *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988) (reviewing by appeal remand order based on forum selection clause). *Cf. Coastal Steel v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 195-97 (3d Cir.), *cert. denied*, 460 U.S. 890, 104 S.Ct. 349 (1983) (order *denying* motion to dismiss based on forum selection clause appealable as "collaterally final order under section 1291").[3]

Here, the District Court's Remand Order fits precisely into the *Pacor – Cohen* analysis of appellate jurisdiction: The Remand Order conclusively determined the disputed remand issues (authority to remand, timeliness and the validity and effect of the "Service of Suit" clause); such questions are wholly separate from the merits of the litigation (i.e., how much money, if any, does Chesapeake owe Plaintiff pursuant to the reinsurance agreements); and, if not appealable now, the Remand Order would be unreviewable. *Pacor*, 743 F.2d at 987-989 & n.7; *see also Cone*, 460 U.S. at 10-12; *Pelleport*, 741 F.2d at 278.

Similarly, as with the stay at issue in *Cone*, the Remand Order below means that "there [will] be no further litigation in the federal forum", and thus "amounts to a dismissal since its "purpose and effect" is "to surrender jurisdiction" to the state court. *Cone*, 460 U.S. at 9-10 & n.11; *see also Pacor*, 743 F.2d at 989-90; *Pelleport*, 741 F.2d at 278.

Although, in *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52, 96 S.Ct. 584, 593 (1976), the Supreme Court noted, without discussion, that its earlier decisions had characterized a remand order as not representing a final judgment reviewable by appeal, this Court, in *Pacor*, declined to follow the *Thermtron* Court's statement and held a remand

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[3] As discussed below, the Court of Appeals in both *Pelleport* and *Karl Koch* also ruled that the bar of 28 U.S.C. § 1447(d) did not apply to a remand order based on a contractual forum selection clause.

order to be appealable. *Pacor*, 743 F.2d at 990 n.9. This Court reasoned that the earlier cases under discussion in *Thermtron* were decided before the *Cohen* collateral order doctrine was developed, and that *Thermtron* itself preceded *Cone*. *Id.*[4]

Accordingly, the Remand Order issued below is appealable as of right pursuant to 28 U.S.C. § 1291.

B. *Chesapeake's Appeal Is Not Precluded by Statute*

In pertinent part, 28 U.S.C. § 1447(d) provides that an "order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise". However, this Court's appellate jurisdiction to review the remand order at issue herein is unaffected by this statute.

The Supreme Court and Court of Appeals repeatedly have held that the appellate bar of § 1447(d) strictly is limited to remand orders expressly based on those grounds for remand specified in 28 U.S.C. § 1447(c). *Thermtron*, 423 U.S. at 345-52; *Air-Shields, Inc. v. Hon. John P. Fullam*, 891 F.2d 63, 65-66 (3d Cir. 1989); *Karl Koch*, 838 F. 2d at 658-59; *Pelleport*, 741 F.2d at 276-77; *Levy v. Weissman*, 671 F.2d 766, 769 (3d Cir. 1982); *see Pacor*, 743 F.2d at 991. Accordingly, § 1447(d) is inapplicable to the remand order issued below.

As set forth above, § 1447(c), the statute which governs the remand of cases removed from state court, recognizes two distinct bases for remand – defects in removal procedure, and defects in subject matter jurisdiction. *Supra* note 1. In *Thermtron*, the Supreme Court explained:

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[4] In *Corcoran v. Adra Ins. Co., Ltd.*, 842 F.2d 31, 34-35 (2d Cir. 1988), after much criticism, the Second Circuit abided the Supreme Court's statement in *Thermtron* regarding the finality of a remand order, there based on grounds of abstention. However, in *Ardra* the Court expressly reaffirmed its ruling in *Karl Koch* that a remand order founded on a forum selection clause is properly reviewable pursuant to § 1291 as a collateral final order. *Id.* at 35.

> Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and § 1447(c) must be construed together. . . . This means that only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review.

423 U.S. at 345-46. This Court, in *Fullam*, last year reaffirmed this construction of § 1447(d). 891 F.2d at 65-66. *Accord Karl Koch*, 838 F. 2d at 658-59; *Pelleport*, 741 F.2d at 276-77.[5]

Here, as noted, Plaintiff's remand motion was based on two grounds *not* provided for by § 1447(c), abstention and the "Service of Suit" clause in the subject reinsurance agreements; the District Court granted the motion based on the latter ground. Clearly, a remand order premised on a forum selection clause is not based on either ground specified by § 1447(c); therefore, it is not immunized from review by § 1447(d). *Karl Koch*, 838 F.2d at 658-59; *Pelleport*, 741 F.2d at 276-77.

Accordingly, since the Remand Order below was not predicated on a ground authorized by § 1447(c), it fully is reviewable by this Court on appeal.[6]

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[5] Prior to enactment of the 1988 Judicial Improvements and Access to Justice Act, Pub.L.No. 100-702 (1988), § 1447(c) provided "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs". The remand order at issue here, however, is governed by the amended statutory provisions. *See Fullam*, 891 F.2d at 65 (1988 amendments to removal and remand provisions effective upon passage).

[6] Further, irrespective of the basis for remand, the Remand Order is reviewable because, as in *Fullam*, 891 F.2d at 66, the District Court "exceeded its statutorily defined power" by remanding this action in violation of § 1447(c)'s mandatory thirty day time limit.

EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT AND THE COURT'S RULING, THE HONORABLE LOUIS H. POLLAK, U.S.D.J., PRESIDING (OCTOBER 4, 1990)

THE COURT: All right, Mr. Zensky, I think I understand your position as it relates to the interplay between remand and abstention.

Let's take the other prong of the Commissioner's argument, the forum selection clause. Now, I understand that you differ from your friend on how the forum selection clause should be read. We'll pretermit that.

Let's assume, however, that there is a forum selection clause about which none of us can have any argument as to the meaning of — add a few prepositions at the end. The forum selection clause says all the nice stuff that's in this clause and adds, by the way, we, Chesapeake, also mean to waive any privilege of removal to a Federal Court that we might otherwise enjoy in the event that — in the event that Mutual Fire, or its successor, entitled Commissioner Foster — who is soon going to be coming along because Mutual [Fire] handles its business — initiates litigation in the State Court.

So there is this language which none of us are going to argue about. Ms. Foster brings her lawsuit in the State Court. You remove. Ten minutes later, Ms. Foster moves to remand on the ground of the forum selection clause. You say, no, with all respect, Ms. Foster's got it wrong. Forum selection clauses aren't embraced within the grounds of remand that are covered by 1447(c); is that right?

MR. ZENSKY: That's right, Your Honor. I would point certainly to the Thermtron ruling, where the court said that Congress did intend to let the District Courts revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them, but which are not recognized by the controlling statute.

THE COURT: On the face of that argument, where does Ms. Foster go to enforce her forum selection clause?

MR. ZENSKY: Well, to the extent there was one that is stated, as you put it very clearly, perhaps there would lie a dismissal or summary judgment type motion in that situation to enforce it, but not a remand.

THE COURT: Dismissal for summary judgment? Let me see if I understand.

MR. ZENSKY: Enforce the terms of the clause as the plaintiff saw it.

THE COURT: So Ms. Foster has brought her suit — she's brought her suit and you removed it. She asks for remand, relying on the clause, and you say, no, judge, you have to dismiss her case.

Then what does she do? She sues again in the State Court, and by then you hope the statute has run?

MR. ZENSKY: Or we remove it again.

THE COURT: You remove it again, and again it gets dismissed. And so there becomes no way in which Ms. Foster can proceed with her litigation. That doesn't sound like a likely scenario.

MR. ZENSKY: The plaintiff hasn't asked for a dismissal. The plaintiff asked for remand. Our point is that the statute doesn't recognize this basis for remand.

THE COURT: So you're telling me that this carefully crafted forum selection provision is functus officio?

MR. ZENSKY: For more reasons than one, yes.